80-1474

FEB 28 1981

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

ANDREW J. WINSTON, Sheriff,
City of Richmond,

AUBREY M. DAVIS, Commonwealth's Attorney
for the City of Richmond,

CIRCUIT COURT OF THE CITY OF RICHMOND,
DIVISION I

Petitioners,

v.

JOSEPH G. MOORE, JR.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. MARSHALL COLEMAN,
Attorney General of Virginia

LINWOOD T. WELLS, JR.
Assistant Attorney General

Supreme Court, State Library Building
Richmond, Virginia 23219

QUESTION PRESENTED

I. WOULD PETITIONER HAVE BEEN SUBJECTED TO DOUBLE JEOPARDY WHEN THE TRIAL COURT DECLARED A MISTRIAL ON THE GROUND THAT THE JURY COULD NOT REACH A VERDICT AND THEREAFTER SCHEDULED A RETRIAL?

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PRELIMINARY STATEMENT

Andrew J. Winston, Aubrey M. Davis, and Circuit Court of the City of Richmond, Division I, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on December 18, 1980.

For purposes of uniformity, the Respondent herein, Joseph G. Moore, Jr., shall hereinafter be referred to as Petitioner, and the Petitioners herein, Andrew J. Winston, Aubrey M. Davis, and Circuit Court of the City of Richmond, Division I, shall hereinafter be referred to as the Commonwealth.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, is included in the Appendix. The Opinion of the United States Court of Appeals for the Fourth Circuit dated December 8, 1980, is included herein in the Appendix.

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was charged with feloniously breaking and entering with intent to commit larceny and was tried on January 9, 1980, by the Circuit Court of the City of Richmond, with a jury. The jury was unable to reach a verdict, and the Trial Court declared a mistrial. Subsequently, another trial upon the same charge was scheduled.

On March 10, 1980, Petitioner was again tried before another jury, all evidence was presented, and at approximately 4:35 o'clock p.m. the jury retired to deliberate. At approximately 6:00 o'clock the jury recessed for the evening.

Prior to recessing, the Trial Court had been made aware that at least one member of the jury was sick with the flu and was crying and that another desired to return home that night because his wife was ill. In addition, the Trial Court was concerned about another juror's willingness to ever vote for a conviction.

The next morning at 10:00 a.m., the Court gave the jury its version of the "Allen" charge. The charge was given, according to the Trial Court, in the hope of "dynamiting what otherwise might be a hung jury" and was described by the Trial Court as being successful "in the last couple of years." The Trial Court felt "from the demeanor of the jurors" that a verdict would be "difficult to come by" and "sensed considerable discord in the jury and among the jurors."

The jury then began deliberating. At approximately 10:50, however, the jury "buzzed" the courtroom, and the Trial Court brought the jury into the courtroom and summoned counsel.

The Trial Court then asked the jury whether they had reached a verdict, and the foreman replied, "Your Honor, the jurors have not been able to reach a verdict." The Trial Court then excused the jury and declared a mistrial, no objection having been made by the Petitioner. The Court said it felt that the jury was hung when "the foreman said it was hung."

Prior to a scheduled third trial, Petitioner filed in the Circuit Court a Petition for a Writ of Habeas Corpus, com-

plaining that retrial would subject him to double jeopardy. The Court denied the Writ. The Supreme Court of Virginia affirmed the decision of the Circuit Court the same day.

Petitioner then filed in the United States District Court for the Eastern District of Virginia, Richmond Division, a Petition for a Writ of Habeas Corpus pursuant to the provisions of 28 U.S.C. § 2254. The Court, after considering the evidence and argument of counsel, granted the Writ. The case was appealed to the United States Court of Appeals for the Fourth Circuit, a panel of which, by decision of December 18, 1980, affirmed the District Court decision, one judge dissenting in a per curiun opinion.

I. PETITIONER WAS NOT SUBJECTED TO DOUBLE JEOPARDY WHEN THE TRIAL COURT DECLARED A MISTRIAL ON THE GROUND THAT THE JURY COULD NOT REACH A VERDICT AND THEREAFTER SCHEDULED A RETRIAL.

The leading case relating to double jeopardy decided by this Court is *United States* v. *Perez,* 9 Wheat 579 (1974). There, this Court, holding that the defendant had not been subjected to double jeopardy when he was retried after the jury had been unable to agree at his first trial, stated in 9 Wheat at p. 580 as follows:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.... But, after all, they [the courts] have the right to order the discharge; and the security which the public have for the faithful, sound, and

> conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office."

Cases decided by this Court subsequent to *Perez, supra,* have followed in the footsteps the above-quoted language.

In *Wade* v. *Hunter,* 336 U. S. 684 (1949), *reh. den.* 337 U. S. 921 (1949), this Court held that the defendant had not been subjected to double jeopardy where his court-martial had been dismissed before the decision had been reached because a peculiar military tactical situation had prevented the attendance of additional witnesses within a reasonable time. After citing *Perez, supra,* this Court refused to adopt a strict rule that absence of witnesses could never justify discontinuance of the trial and disagreed with the argument that there had been violation of the double jeopardy provision because there had been no "urgent necessity." That Court pointed out that it had stated in the *Perez* case that "the sound discretion of a presiding judge should be accepted as to the necessity of discontinuing a trial." (336 U. S. at p. 692).

Thereafter, in *Gori* v. *United States,* 367 U. S. 364 (1961), the defendant claimed that his retrial subjected him to double jeopardy where his first trial resulted in a mistrial declared by the Court when it had withdrawn a juror. Citing earlier cases including *Perez, supra,* and *Wade, supra,* this Court stated:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." 367 U. S. at p. 368.

This Court stated that the case fell within the "broad considerations" of the language in *Perez, supra,* and stated:

> "It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously

> to exercise their most sensitive judgment—according to their own lights in the intermediate exigencies of trial—for the more effective protection of the criminal accused." (367 U. S. at pp. 369-370).

In *United States* v. *Jorn,* 400 U. S. 470 (1971), where a mistrial had been declared by the District Court which felt that potential witnesses had not been adequately warned of their rights, this Court held the defendant to have been subjected to double jeopardy, concluding that the Trial Judge had "abused his discretion in discharging the jury" and had "made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial."

In *Arizona* v. *Washington,* 434 U. S. 497 (1978), the Trial Court granted the prosecution's motion for a mistrial where there had been improper comment during defense counsel's opening argument. Attacking a probable retrial, petitioner claimed he would be subjected to double jeopardy.

This Court stated that the words, "manifest necessity," did not "describe a standard that can be applied mechancially or without attention to the particular problem confronting the trial judge" and added:

> "We are persuaded that, along the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny, the difficulty which led to the mistrial in this case also falls in an area where the trial judge's determination is entitled to special respect." (434 U. S. at p. 510).

In all of the above cited cases this Court has been consistent in application of the "manifest necessity" test to a variety of circumstances presenting themselves at trial. However, in none of these cases has this Court had occasion to apply the test to circumstances similar to the instant case.

In the instant case, the Court of Appeals has, in effect, held that the Trial Court did not exercise sound discretion in discharging the jury. One of the more solemn duties vested

with trial courts is that of declaring a mistrial, where proper. Intrusion into the discretion given a trial court should not be viewed lightly, and guidelines for such intrusion should be as clear as possible. It is for that reason, therefore, that this Court should grant certiorari herein.

In addition, the instant case presents an issue as to whether the Trial Court was bound to question each member of the jury individually in order to determine that a verdict could not be reached. Petitioner argued this position both at the District Court and at the Court of Appeals. If there be such a requirement, it is one which is an extremely important one procedurely, and this Court should pass upon the validity of it.

The instant case also presents an issue of whether double jeopardy can be waived by failure of defense counsel to object to an improper mistrial. While in the instant case defense counsel maintained that the Court acted before he had the opportunity to object, no reason has been suggested as to why defense counsel could not have interrupted the Trial Court in order to make the objection or ask the Trial Court to reconsider its decision to declare a mistrial. The issue of whether double jeopardy may be waived is one not fully decided by this Court. Indicative of this is this Court's statement in *Menna* v. *New York,* 432 U. S. 61 (1975), where this Court stated, "We do not hold that a double jeopardy claim may never be waived." 432 U. S. at p. 63, n. 2.

It is submitted, therefore, that important and somewhat novel issues are present in the instant case. If certiorari be granted, this Court will have the opportunity to apply the prohibition against double jeopardy to facts dissimilar from those in any other case decided previously by it, the opportunity to review the issue of whether a trial court, before declaring a mistrial, must first question each juror, and the additional opportunity to review the issue of whether, and under what circumstances, a double jeopardy claim may be waived by defense counsel by failure to object.

Certiorari should be granted in the instant case for the additional reason that the decision of the Court of Appeals is in conflict with that of the Virginia Supreme Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the judgment in this case reversed.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

LINWOOD T. WELLS, JR.
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Linwood T. Wells, Jr., Assistant Attorney General of Virginia, Counsel for the Petitioners in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before February 26, 1981, I mailed copies of the foregoing Petition for a Writ of Certiorari to Joseph S. Bambacus, Esquire, 605 Mutual Building, Richmond, Virginia 23219, Counsel for Respondent.

Linwood T. Wells, Jr.
Assistant Attorney General

APPENDIX

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ORDER ENTERED BY THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I, DECLARING A MISTRIAL AND SCHEDULING PETITIONER'S CASE FOR RETRIAL, ENTERED MARCH 11, 1980.

COMMONWEALTH

vs

Indictment for Statutory Burglary F-11-193

JOSEPH GREEN MOORE, JR., Dft.

Trial of the above case began on March 10, 1980, at which time the defendant was led to the bar in the custody of the Sheriff of this City and was represented by Attorneys Joseph Bambacus and Stylian P. Parthemos, retained, and the Commonwealth was represented by Carol N. Breit.

And the defendant being arraigned, pleaded not guilty to Statutory Burglary as charged in the indictment, after consultation with counsel.

And the Sheriff of this City having returned the writ of venire facias heretofore issued by order of this Court, with the names of the persons summoned in pursuance thereof, and of the veniremen so summoned and attending, a panel of twenty qualified jurors, free from exception for the trial of the defendfant was made up and completed. And the Attorney for the Commonwealth and the Attorney for the accused having alternately, beginning with the Attorney for the Commonwealth, each stricken the names of four of the said veniremen, the remaining twelve constituted the jury for the trial of the accused, and they were sworn the truth of and upon the premises to speak.

The witnesses were then sworn and the evidence and arguments of counsel presented, and the jurors retired to their room in the custody of the Sheriff of this City to deliberate upon a verdict in this case. And after some time the jurors being unable to reach a verdict and the hour being late, said case was continued to March 11, 1980, at 10:00 A.M., and the jurors were adjourned to said day and hour, having been admonished by the Court, and the defendant was remanded to jail.

The defendant was this day, March 11, 1980, again led to the bar in the custody of the Sheriff of this City and also came his counsel and that for the Commonwealth, as of record, and the jurors sworn on March 10, 1980, appeared according to their adjournment.

And the jurors retired to their room in the custody of the Sheriff of this City for further deliberation upon a verdict in this case. And after some time, being unable to reach a verdict, the jurors returned into Court and mistrial declared. And the jurors were discharged from further consideration in this case.

And said case is re-set for trial by jury on April 16, 1980, and witnesses as stated in the record were recognized to appear on said day.

And the defendant by counsel moved the Court to set bond, which motion the Court denied and the defendant is remanded to jail.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I, GIVEN AT THE CONCLUSION OF THE HEARING HELD ON APRIL 16, 1980.

Judge:

Alright. I will say this. I think a little bit of history is in order. Nobody has talked about the first trial. I'm not asking whether you agree with this, I'm saying the Court's recollection of the first trial is that after an hour or so the jury returned with a question, and the question was to the effect that whether the basement where the defendant was found was part of Mr. McGowans "property". At that time I explained to the then foreman, or rather before he ever asked his question, I explained that where there is a question that may be perfectly logical and reasonable, that under the rules under which this court is bound, it was quite possible I would not be able to answer the question. So, Counsel were conferred with briefly and I told the jury that all while the question was logical and reasonable. I was not committed to answer it. That they had heard all the evidence, they had all the instructions, and so

Judge:

would they please continue to deliberate. I was satisfied then that the jury would hang. Because I had a clear recollection that the question had not been asked. And while I have not read a transcript of the first trial, it is still my clear recollection that that question was not asked. And an hour or two later, the jury, in effect, notified the Court that it was hung and so it was declared to be hung. The second trial, the jury had been out an hour or so and I believe it happened that both counsel were in chambers when sheriff Johnson reported that two of the jurors in effect had to go home and that those jurors were adamant, that one had a sick wife and the other I don't have a clear recollection, that there was then a message that she was not feeling well, that she had inquired about staying over night and so the jury was sent home for the evening after being admonished. Yes, indeed, it was the most obvious thing in the world that a white female juror was crying, that she had a handkerchief, or kleenex to her facial area. I would take it that everybody took note of that. At any rate, at sometime the message was received that she had the flu, there was no verdict in the evening, they were sent home, and the next morning at 10:00 o'clock, because I anticipated or I felt from the demeanor of the jurors that a verdict would be difficult to come by, I started with my version of the *Allen* charge. My version of the *Allen* charge may be different from other judge's in that I've taken the *Allen* charge as approved in the Poindexter case and rephrased it with emphasis maybe in hopes of dynamiting what otherwise might be a hung jury, and this has been successful in the last couple of years on numerous occasions. I mention that because I felt then that it would be difficult for that jury to reach a verdict. I thought the jury should reach a verdict and since dynamiting is approved, I dynamited. Of course, I was cognizant with the problem of the white female and her demeanor, and another juror, a male juror, and his demeanor, and I frankly had never faced this before and I have to digress for a moment to say that the jurors, and the jury officer Mr. Billips, gives jurors at the beginning of every month, a thorough orientation and the judges take turns hearing jury excuses and if any—think I think we're liberal in excusing the jurors for

Judge:

sickness, vacation, whatever. At any rate, I have never had the occasion before of jurors deciding when they should go home for the evening and as it was relayed to me, these two jurors were not making, they were telling; and so, on the next morning, after the dynamite and after another approximate hour, the jury returned and I was satisfied that the jury was hung from the demeanor of the jurors and reached a verdict the evening before, they had not reached a verdict that morning, I sensed considerable discord in the jury and among the jurors. One of the 12 jurors had been tried in this courtroom on a drug charge some years earlier and the expungement statute had been effected, the effect of which was that she was not convicted. I recall also a drug case I had had 5 or 6 years ago with a jury and I believe that same juror was even present in the courtroom, as an interested spectator in the *Jefferson* jury case about 1972. At any rate she remained on the jury. I mention that because the consequence of all of this was my strong feeling that this jury was hung when the foreman said it was hung. Having never before experienced from jurors what had happened with these 2, as the transcript shows, I said to the jury then that I am going to excuse you in a moment but I have some remarks to address to two of the jurors, and I did not name names, but I knew that they knew of whom I spoke, and that it on pages 5, 6, and 7 of the transcript. I guess it is safe to characterize it as a chastizement of those two jurors. At any rate, at that time I discharged the jury and would do the very same today were it to arise. I otherwise concur in the argument presented by the Commonwealth's Attorney and see no need to repeat references to cases or other arguments. Motions, Mr. Bambaccus, are denied and the case is set with a jury tomorrow at 10:00 o'clock.

ORDER ENTERED BY THE SUPREME COURT OF VIRGINIA DISMISSING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS, ENTERED APRIL 16, 1980.

Joseph B. Moore, Jr.,
Petitioner,

against Record No. 800566

Andrew J. Winston, Sheriff of the City of Richmond, et al.,
Respondents.

Upon a Petition for a Writ of Habeas Corpus and Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction

On April 16, 1980, came Joseph B. Moore, Jr., by counsel, and filed a petition for a writ of habeas corpus, and for other relief, in the above-styled case.

Upon consideration whereof, the court is of opinion that the writ of habeas corpus, and other relief, should not issue as prayed for and it is ordered that the petition and application be, and the same are hereby dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION, GIVEN AT THE CONCLUSION OF THE HEARING HELD ON APRIL 17, 1980.

I find as a fact the matters set forth in the sworn petition. I find as a fact the findings of fact reached by the trial judge, Judge Lumpkin. I do not necessarily find the conclusions. For instance, I do not find as Judge Lumpkin found that the jury informed him that they were deadlocked, since the transcript shows that his colloquy was only with the foreman, and the foreman's answer was not that they were unable to reach a verdict, but that they had not reached a verdict.

I find nothing irrational or unreasonable in the action taken by Judge Lumpkin. However, the question is not, I think, whether it was irrational or unreasonable, but, instead, whether or not it complied with the law as laid down in *United States* against *Perez,* that is, that a mistrial can be declared only if there is a, quote, manifest necessity, end quote. And this question of manifest necessity has been interpreted by the Third Circuit in *Rusoe* and in *Webb,* cases which the lawyers in this case have agreed are the law of this case.

And the method by which manifest necessity is to be determined is set forth in those cases and controls. That method was not followed so that there is no record which can support a finding of manifest necessity.

There is, of course, no magic number of hours. However, the fact that the jury had just had, presumably, a night's rest, and had been deliberating for approximately an hour at the time that the mistrial was declared does not lead this court to believe that there had been such a lengthy period of deliberation that the length of deliberation was a factor to be considered in determining manifest necessity. To the contrary, the length of deliberation is a factor which suggests the absence of manifest necessity. In addition, the colloquy between the court and the jury foreman is not clearly an indication of a manifest necessity. The colloquy disclosed under the circumstances that one could infer, reasonably infer, that the foreman believed that not only had no verdict been reached but that none could be reached, and I'm sure that is the inference that Judge Lumpkin drew. And, as I say, it's certainly a reasonable inference. And yet the right to be free from double jeopardy is such that the Supreme Court and the Circuit Courts have indicated that the judge's duty is to inquire further and to be reasonably certain, as reasonable as we can be, that there is indeed a manifest necessity.

Accordingly, I think that the answer of the foreman was insufficient to form a record upon which one could determine that there was a manifest necessity to declare a mistrial.

Further, I think that it is clear from the cases that it's the duty of a judge to inquire of the jury as a whole. I can readily

believe that perhaps some one or more of the jurors nodded their head, or gave some other indication of assent, but Judge Lumpkin made no such finding. Therefore I cannot simply reach that conclusion out of thin air. I must base my conclusions on the record, and the record indicates that there was no effort to determine from the other 11 jurors what their view was on whether or not there was a manifest necessity or whether or not the jury would be able to reach a verdict were it allowed to deliberate further.

I think that such an inquiry by the court is required by the law, and in the absence of such an inquiry there is no record which would support a finding that a mistrial was manifestly necessary. Accordingly, the court will direct the issuance of a writ of habeas corpus to the petitioner, Joseph G. Moore, Jr., and Joseph G. Moore, Jr., shall be free from any further jeopardy on the charges set forth in the indictment against him set forth in the record in this case.

FINAL JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION, ENTERED ON MAY 12, 1980.

JOSEPH G. MOORE, JR.

v.

ANDREW J. WINSTON, etc., et al.

CIVIL ACTION
NO. 80-0283-R

JUDGMENT ORDER

Final judgment is entered in accordance with the findings of fact and conclusions of law stated by the Court in the plenary hearing on 17 April 1980.

And it is so ORDERED.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, ENTERED ON DECEMBER 18, 1980.

No. 80-6405

Joseph G. Moore, Jr.,

Appellee,

v.

Andrew J. Winston, Sheriff, et al.

Appellants

PER CURIAM:

The Commonwealth of Virginia appeals the district court's grant of a writ of habeas corpus on the ground that retrial of the prisoner, Joseph G. Moore, Jr., would subject him to double jeopardy. We affirm for the reasons adequately stated by the district court.

AFFIRMED.

Judge Widener dissents.